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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-5958

RAYMOND RICKMAN,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner, Raymond Rickman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming, without opinion, the judgment of the United States District Court for the Eastern District of New York convicting him of bank robbery (18 U.S.C. §2113(d)).

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on November 24, 1975; a copy of the judgment is annexed hereto as Appendix A.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether it is Constitutionally permissible for the Government to introduce in its direct case evidence of a defendant's invocation of the Fifth Amendment privilege, and whether a defendant's partial cooperation waived forever the right to this privilege.

2. Whether, as an evidentiary matter, the use of a defendant's invocation of the Fifth Amendment privilege, which was non-probative of his guilt, was so highly prejudicial as to deny him his right to a fair trial.

STATEMENT OF THE CASE

Petitioner Raymond Rickman and his co-defendant, Richard Smith, were charged with the December 23, 1974, robbery of a branch of the Chase Manhattan Bank in Jamaica, Queens. The robbers escaped from the bank with approximately $16,000, four hundred dollars of which was marked as "bait" money. The issue at trial was one of identity.

In its direct case, the Government presented the testimony of FBI Agent Morrison, who asserted that at the time of arrest petitioner had approximately $700 in his possession. Morrison further testified that he asked petitioner, after informing him of his Miranda rights, to sign a receipt for the money, and petitioner refused to do so.

This testimony prompted a sua sponte instruction from the trial judge that petitioner did not have to sign the receipt and that the jurors were not to infer guilt from his refusal to do so. Despite this ruling, the prosecutor subsequently elicited from Agent Morrison that during the course of interrogation, petitioner, having chosen to answer some questions,

then changed his mind and remained silent. Specifically, Agent Morrison testified:

> At the precinct I specifically asked him how could he know if he was asleep [at the time of the robbery] if we didn't tell him what time the robbery was.
>
> [The Prosecutor:] What, if anything, did Mr. Rickman say to that, sir?
>
> [Morrison:] He said nothing.

Again the trial judge, sua sponte, informed the jurors that petitioner was not required to say anything.

In his summation the prosecutor disregarded the judge's cautionary instructions and argued to the jurors that they could infer guilt from the fact that petitioner had refused to sign the receipt and had chosen to remain silent in response to one of the questions posed during the custodial interrogation. Of petitioner's refusal to sign the receipt, the prosecutor said:

> But the real key, the real key to how dirty that money was, and what Mr. Rickman knew about that money and what its source was is this:
>
> The FBI takes the money and counts it out in front of Mr. Rickman, they fill out a voucher and they give him the voucher and they ask him to sign it, and he refuses to sign it.
>
> If the FBI had just taken a large amount of money from you or anything valuable that belonged to you and that you wanted to reclaim --

At this juncture the judge interrupted the summation to reprimand the prosecutor and instruct the jurors that they were not to draw any such inference of guilt.

Of petitioner's custodial silence, the prosecutor said:

> As you recall the testimony of the agents when asked the obvious question, How do you know about the time if we never told you the time, Mr. Rickman had nothing to say. He didn't say he heard it elsewhere because he didn't. He had firsthand, firsthand knowledge of the time because he was in the bank at the time.

The evidence of petitioner's silence was critical to the prosecution. The other evidence in the case was scant.

Petitioner had consistently maintained his innocence. None of the "bait" money was found in his possession. Throughout the robbery and escape, each of the robbers -- there were three -- concealed his face by pulling his sweater up to his nose and his hat down over his forehead. Four of the eyewitnesses to the robbery could not identify petitioner as one of the robbers.

While there was one eyewitness identification of petitioner by a bystander observer of the escape, his testimony was impeached by another witness who, having observed the same scene, asserted that the robber's face was hidden by his apparel so as to preclude identification. A fingerprint found in the rear seat of the co-defendant's car -- described by observers as one of the getaway cars -- was explicable consistent with innocence, since petitioner and the co-defendant were friends.

REASONS FOR GRANTING THE WRIT

I.

This case presents the constitutional question left unresolved in United States v. Hale, 95 S.Ct. 2133 (1975), of whether the Government may introduce in its direct case evidence of a defendant's invocation of the Fifth Amendment privilege and further whether the defendant, having chosen to cooperate partially, has waived forever his right to assert the privilege.

These questions are closely related to those in Doyle v. Ohio, Docket No. 75-5014, cert. granted, 44 U.S.L.W. 3201 (October 6, 1975), and Wood v. Ohio, Docket No. 75-5015, cert. granted, 44 U.S.L.W. 3201 (October 6, 1975), in which the Court will review whether the prosecution can cross-examine about and draw inferences of guilt in summation from the assertion of the privilege at the time of arrest.

Petitioner's refusal to sign the form and to answer questions at the time of his arrest were permissible under the Fifth Amendment. Petitioner's signature on the receipt would have been his personal acknowledgment that the money had been taken from him. As such, the signature was sought in order to be used for its "testimonial or communicative content," and appellant's refusal to sign was therefore within the protections afforded him by the Fifth Amendment. United States v. Dionisio, 410 U.S. 6, 7 (1973); Gilbert v. California, 388 U.S. 263, 266 (1967); Boyd v. United States, 116 U.S. 616 (1886).

Also protected by the privilege was petitioner's refusal to answer Morrison's specific question concerning how he knew the time of the robbery. Petitioner accomplished the preservation of his rights simply by choosing to remain silent when asked how he knew what time the bank was robbed. Miranda v. Arizona, 384 U.S. 436, 473-474 (1966); Developments in the Law, 79 Harv. L.R. 938, 1042-1043 (1966). The Government's use of petitioner's refusal to cooperate as proof of his guilt impermissibly infringed on his Fifth Amendment privilege.* Miranda v. Arizona, supra, 384 U.S. at 468, n.7; United States v. Ivey, 344 F.2d 770, 772 (5th Cir. 1965); Helton v. United States, 221 F.2d 338, 341 (5th Cir. 1955).

In its brief in the Court of Appeals the Government argued, citing Brown v. United States, 356 U.S. 148 (1957), and Fitzpatrick v. United States, 178 U.S. 301 (1899) -- both

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*The trial judge's sua sponte effort to remedy the error by cautionary instruction was not sufficient. United States v. Hale, supra, 95 S.Ct. 2113. Moreover, while in Hale there was but one isolated reference to the defendant's custodial silence, in this case there were four such references. Repetition of the error could only have served to highlight the significance of the evidence and ensure that the jury would be unable to disregard it. Clearly, if the prosecutor was unable to comply with the judge's cautionary instructions, once the evidence was articulated and the inferences of guilt drawn, the jurors could not reasonably be expected to have excluded the testimony from their deliberations.

cases in which the defendant testified at trial -- that petitioner, having chosen to answer some questions, waived for all time his right to assert the privilege. The Court, in Miranda v. Arizona, supra, 384 U.S. at 476, anticipated and rejected this argument:

> ... [W]here in-custody interrogation is involved there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.

Most recently, in Michigan v. Moseley, 44 U.S.L.W. 4015, 4018 (December 19, 1975), the Court reaffirmed that the admissibility of custodial statements under Miranda turns on whether a defendant's "'right to cut of questions' was 'scrupulously honored.'"

The Government's argument, followed to its logical -- or illogical -- conclusion, would mean, Griffin v. California, 380 U.S. 609 (1965), notwithstanding, that once an accused had spoken to investigators he would not then be free to remain silent at trial without the prosecutor's commenting on his failure to testify.*

The rationale of cases like Brown v. United States, supra, 356 U.S. at 155, and Fitzpatrick v. United States, supra, 178 U.S. at 315, is that a witness who voluntarily presents his version of the facts by testifying before the jury cannot insulate that testimony from scrutiny by refusing to answer relevant questions on cross-examination. None of those concerns are present in this case. If the Government had not offered the statements, they would have remained hearsay, outside the knowledge of the jury. It is a high form of distorted logic,

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*Moreover, petitioner had been specifically informed by investigators, as part of the Miranda warnings, that should he desire to cooperate, he was nonetheless free to stop answering questions at any time. In this context, the Government is stopped from asserting waiver. See also United States v. Hale, supra, 95 S.Ct. 2163.

indeed, for the Government to argue that, because the prosecution introduced petitioner's pretrial statements in its direct case, petitioner is therefore not entitled to exclude from evidence before the jury his selective invocation of the Fifth Amendment privilege.

II

This case presents the important question, not presented in United States v. Hale, supra, 95 S.Ct. 2133, of whether the prosecutor's use of petitioner's invocation of the privilege in the direct case was not probative of guilt and was so highly prejudicial as to deny petitioner his right to a fair trial.

The sequence of events in this case makes plain that the post-arrest conduct at issue was not properly susceptible to the Government's inferences of petitioner's involvement in the crime. When petitioner was arrested he was informed that the charge against him was the robbery of the Chase Manhattan Bank. According to FBI Agent Morrison, petitioner was also informed of his constitutional rights, including the caveat that anything he said could be used against him at his trial on the robbery charge, and that he could cease answering questions at any time. Then, in petitioner's presence, the approximately $700 was counted out, a receipt for the money drawn by the agents, and petitioner asked to acknowledge in writing that this money had been found in his possession.

In this context it was more than reasonable for petitioner to conclude that, no matter what the real source of the money, the agents intended to use his possession of it as evidence against him on the bank robbery charge. Rather than constituting proof that the money had been stolen, petitioner's refusal to sign the receipt was just as likely the product of his fear, his confusion, or the exercise of the rights about which he had so recently been informed. United States v. Hale, supra, 95 S.Ct. 2133.

Similarly, petitioner's declination to respond to Agent Morrison's question about petitioner's knowledge of the time of the robbery might well have been the product of petitioner's realization that, no matter what explanation he offered, however truthful, the agent would not believe him. United States v. Hale, supra.

Because this challenged evidence was not probative of guilt and had a significant potential for prejudice, its presentation to the jury mandates reversal.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of November one thousand nine hundred and seventy-five.

Present:

HON. LEONARD P. MOORE

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. ALBERT W. COFFRIN
District Judge

United States of America, Plaintiff-Appellee, v. Raymond Rickman, also known as "Chink", Defendant-Appellant, Richard Smith, Defendant.	75-1242 75-1305

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

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